Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1274

PEGGY JEAN THOMPSON,
Petitioner

versus

STATE OF ALABAMA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

EARL E. CLOUD
Cloud and Cloud, P.C.
Suite 368, Central Bank Building
Huntsville, Alabama 35801
Counsel for Petitioner

SUSAN L. CLOUD
Cloud and Cloud, P.C.
Suite 368, Central Bank Building
Huntsville, Alabama 35801
Counsel for Petitioner

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO.

PEGGY JEAN THOMPSON,
Petitioner

v.

STATE OF ALABAMA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

The petitioner, Peggy Jean Thompson respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Alabama entered in this proceedings November 22, 1978.

OPINION BELOW

The judgment and opinion of the Court of Criminal Appeals of Alabama was rendered July 25, 1978. The Court of Criminal Appeals amended its Decree and denied the Motion for Rehearing, which was entered with an opinion on August 29, 1978. The opinions of the Court of Criminal Appeals of Alabama are reported in 364 So.2d 681, and 364 So.2d 683, and appear in the Appendix hereto. No opinion was rendered by the Supreme Court of Alabama in its denial of the Petition for Writ of Certiorari on November 22, 1978. The judgment of the Supreme Court appears and is recorded in

364 So.2d 687. The opinions have not yet been reported in the official text.

JURISDICTION

The Petition for Writ of Certiorari to the Court of Criminal Appeals of Alabama was denied by the Supreme Court of Alabama which entered its judgment on November 22, 1978. The Court of Criminal Appeals of Alabama granted a Stay of Execution of Judgment for ninety (90) days from November 22, 1978, in order for petitioner to effect a Petition for Writ of Certiorari to the Supreme Court of the United States. This Petition for Writ of Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether in a hearing to determine the competency of a defendant suffering from ineradicable, involuntary, extensive, organic amnesia, and without the ability to construct from other sources, knowledge of the events in the commission of a crime, the additional requirement of the presence of a defined mental disorder vitiates provisions for due process, fair trial and right to counsel as enunciated in the Fifth, Sixth and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

The petitioner, Peggy Jean Thompson, suffered at the res gestae, a gunshot wound to the head which permanently destroyed tissue portions of the left frontal and temporal portions of the brain, leaving her partially paralyzed, mentally deficient to a level of borderline retardation, blind in the left eye, with a speech impediment and ineradicably amnesic. The bullet remains lodged in the cranium of the petitioner and has not been subject to surgical removal. Medical testimony was provided by a psychiatrist, a neurosurgeon and two psychologists.

The testimony of the neurosurgeon established that the continued presence of the bullet in the cranium of the petitioner was not the source of the amnesia. The symptom of amnesia in the petitioner was caused by an injury to the hippocampus area of the brain, due to the path of the bullet through the brain from the left frontal portion of the brain to the right temporal and occipital portions of the brain. Accordingly, severe injury to the hippocampus area of the brain is known to cause a loss of memory.

The medical testimony of each of the physicians revealed that amnesia of a psychotic origin can be penetrated through the administration of drugs used to determine the reliability of the amnesic state. Whereas an unequivocable symptom of amnesia which is due to a physiological origin and organic basis will not respond to the administration of drugs or testing procedures used to penetrate the amnesic condition. The medical testimony sustained that petitioner suffers from an organically based amnesia which spans a period of five months and is established to be a reliable and permanent condition.

At trial petitioner was convicted on March 18, 1975 of manslaughter in the first degree with punishment being fixed at five (5) years imprisonment in the penitentiary. Petitioner

appealed to the Court of Criminal Appeals of Alabama which remanded the case with directions to determine whether petitioner was competent to stand trial. Both petitioner and the State of Alabama Ex Rel Attorney General applied to the Supreme Court of Alabama for a Petition for Writ of Certiorari. A Writ of Certiorari was granted in May, 1977. The Supreme Court of Alabama quashed the Writ as having been improvidently granted. The case was remanded and petitioner was determined to have been competent to stand trial in the original case. The judgment of the Court was entered on November 16, 1977. Petitioner appealed to the Court of Criminal Appeals which entered its judgment on July 25, 1978. On Application for Rehearing the Court of Criminal Appeals of Alabama on August 29, 1978 entered a suspension of its previous opinion and rendered an amended opinion. Petitioner's Application for Writ of Certiorari to the Supreme Court of Alabma was denied November 22, 1978.

REASONS FOR GRANTING THE WRIT

1. The decision of the Supreme Court of Alabama, rendered below, is in conflict with the decisions of the Supreme Court of the United States as to the standards and circumstances by which a defendant invoking the Fifth, Sixth and Fourteenth Amendments of the United States Constitution should be determined and adjudged incompetent to stand trial.

At the essence of the due process noumenon, as enunciated in the decision of *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836 (1966) and *Bishop v. United States*, 350 U.S. 961, 76 S. Ct. 440 (1956), exists the concept that no person be

convicted of a crime while he is incompetent to stand trial. Through the *Dusky v. United States*, 362 U.S. 402, 80 S. Ct. 788 (1960) [hereinafter cited as *Dusky*] decision, the constitutional protections for incompetent persons were defined, elaborated, and interpreted to absorb the Fifth Amendment provision for a fair trial, and the Sixth Amendment provision for effective assistance of counsel.

In reliance upon what it conceived to be the principles established in the *Dusky* decision, the Supreme Court of Alabama, in its denial of the Application for Writ of Certiorari, held through the opinion of the Court of Criminal Appeals of Alabama, that the presence of a defined mental defect must exist simultaneously with amnesia before a defendant may be determined incompetent to stand trial. See page 7 of Appendix hereto. Through its decision the Supreme Court of Alabama sets forth the premise that a defendant manifesting a permanent, complete, and established condition of amnesia is barred from asserting incompetency to stand trial, regardless of the extensiveness, severity, cause, or reliability of the amnesic condition. Although the medical evidence of a psychiatrist, a neurosurgeon and two psychologiests unequivocably established that the petitioner was not malingering and was presently suffering organic-retrograde amnesia concerning the events for three months prior to the occurrence of the crime for which she is charged, events occurring at the res gestae of the crime for which she is charged, and events for a period of two months thereafter, the decision below determined that petitioner's mere awareness that she was in fact in a courtroom, her cognizance that she was charged with a crime and her ability to understand from her attorney the possible consequences of conviction, ipso facto rendered her competent to stand

trial. Thus, according to the decision below a defendant's elementary knowledge of the fact that legal proceedings had been initiated against her, sufficiently complies and meets the constitutional tests and requisites of competency, regardless of the defendant's inability to reconstruct the events at the res gestae.

In so holding, the Supreme Court of Alabama decision conflicts with the *Dusky* precept that it is not sufficient that the defendant be oriented as to time and place and have some recollection of events, but in addition, the defendant must have such a present ability to consult with her attorney as to have a rational and factual understanding of the proceedings against her. *Dusky* at 789. In the opinion below, the aspect of orientation as to time and place was emphasized, but the Court did not consider the *Dusky* requisite that a defendant, to be competent to stand trial, must have some recollection of events. See page 3 and page 12 of Appendix hereto. Neither did the Court, in the decision below, scrutinize the case at bar in the light and vision of the second prong of the *Dusky* test which mandates that a defendant minimally possess the ability to consult with her attorney concerning the facts and circumstances of her case, and to possess at least a reasonably rational understanding of the same. *Dusky* at 789. According to the medical testimony of each of the physicians, it was firmly established that petitioner is unable to provide her attorney with any of the facts, dates, circumstances and events at the res gestae due to the extensiveness and severity of the organic injury and the resulting amnesia which spans a period of five months preceding, including and following the res gestae.

This Court in the decision of *Dusky v. United States,*

did not delineate classes of exclusion precluding the assertion of incompetency by a defendant suffering a complete and reliable amnesic state, symptomatic of a severe brain injury. It did enunciate the minimum standards of competency a defendant must possess before he can be put to trial and that are required to assure the protections of the Fifth and Sixth Amendment guarantees of fair trial and right to counsel. Thus, the conflict of the decision below with *Dusky v. United States* is complete.

Moreover, the decision below did not consider the difficulties with a retrospective determination of the defendant's competency which were isolated by the decisions of *Dusky v. United States,* at 789, and *Pate v. Robinson,* 383 U.S. 375, 86 S.Ct. 836 (1966), where the competency hearings were held one year and six years, respectively, after the trials. In the case at bar a competency hearing for the petitioner was held two and one-half years after conviction.

The evidence against the defendant was wholly circumstantial and consisted primarily that the petitioner's body was discovered in her home near that of her husband, the deceased, both having suffered gunshot wounds at approximately the same time, with the petitioner unconscious and still alive. Their house and personal possessions were in a state of disarray and tumult. No eye witnesses were produced.

Furthermore, conflict exists among the decisions of the Courts of Appeal of the United States which have considered the issue of amnesia without a defined mental defect. The District of Columbia Circuit in its decision of *Wilson v. United States,* 391 F.2d 460 (D.C. Cir. 1968)

determined that a defendant suffering amnesia due to a physical brain injury and without a defined mental defect was, under the *Dusky v. United States* standards, entitled to assert incompetency to stand trial. *Wilson* at 463, 466. In the decision of *United States v. Borum*, 464 F.2d 896 (10th Cir. 1972), the amnesia alleged by the defendant was not substantiated by the medical testimony which instead established that the source of the amnesia was psychological as opposed to physical. In addition, although it was not fully concluded, there existed a probability that the amnesia was feigned. *Borum* at 898. The Court rejected amnesia as manifesting incompetency, yet conceded that under a circumstance of extensive findings of amnesia, trial of such a defendant would likely violate constitutional protection. *Borum* at 899. Other Courts of Appeals' decisions which have invalidated amnesia as a bar to prosecution addressed circumstances where there existed dubious and conflicting medical evidence as to the extensiveness and reliability of a defendant's amnesic condition, and in addition strong evidence of guilt. *United States v. Swanson*, 572 F.2d 523 (5th Cir. 1978); *United States Ex Rel Parsons v. Anderson*, 481 F.2d 94 (3rd Cir. 1973); *United States v. Stevens*, 461 F.2d 317 (7th Cir. 1972); *United States v. Mercado*, 469 F.2d 1148 (2nd Cir. 1972); and *United States v. Knohl*, 379 F.2d 427 (2nd Cir.) Cert. denied 389 U.S. 973, 88 S. Ct. 472 (1967).

Finally, the competency of a defendant to stand trial cuts to the marrow of the trial process. The question of competency should not turn upon the fortuitous presence of a narrowly defined mental disorder. The accused must be able to perform the functions which are essential to the fairness and accuracy of a criminal proceedings. A defendant suffering from amnesia established to be reliable and pervasive should not be denied the protections cloaking incompetent persons where constitutional standards of competency are unsatisfied.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment of the Supreme Court of Alabama.

Respectfully submitted,

EARL E. CLOUD
Cloud and Cloud, P.C.
Suite 368, Central Bank Building
Huntsville, Alabama 35801

Counsel for Petitioner

SUSAN L. CLOUD
Cloud and Cloud, P.C.
Suite 368, Central Bank Building
Huntsville, Alabama 35801

Counsel for Petitioner

CERTIFICATE OF SERVICE

In furtherance of the Rules, I hereby certify that I have caused to be served on this the 9th day of February, 1979 by A. B. Letter Service, Inc., 327 Chartres Street, New Orleans, La., Printers, this Petition for Writ of Certiorari.

s/ Earl E. Cloud
Earl E. Cloud

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No.

PEGGY JEAN THOMPSON,
Petitioner

v.

STATE OF ALABAMA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

AFFIDAVIT OF PROOF OF SERVICE

State of Louisiana Parish of Orleans

I, the undersigned, employee of A. B. Letter Service, Inc., 327 Chartres Street, New Orleans, Louisiana, Printers, hereby certify that I have deposited for service three (3) printed copies of a Petition for Writ of Certiorari to the Honorable Charles Graddick, the Attorney General of the State of Alabama, Montgomery, Alabama, and forty (40) printed copies to the Clerk of the Supreme Court of the United States.

This the 14th day of February, 1979.

A B LETTER SERVICE, INC.
327 Chartres Street
New Orleans, Louisiana 70130

BY: Michael W. Bacon

Sworn to and subscribed before me the undersigned, this the 14 day of February, 1979.

Notary Public

RENÉ LEHMANN
Notary Public, Parish of Orleans, State of La.
My Commission is issued for life.

My Commission Expires:
at my death

APPENDIX A
DECISION OF THE COURT OF CRIMINAL APPEALS
OF ALABAMA

IN THE COURT OF CRIMINAL APPEALS
OF ALABAMA

Entered: July 25, 1978

PEGGY JEAN THOMPSON, Appellant

vs. 8TH DIV. 672

STATE OF ALABAMA, Appellee

AFTER REMANDMENT

BOWEN, JUDGE

In compliance with our opinion and order suspending the judgment of conviction and remanding this case to the trial court with directions, the trial court submitted to a jury the issue of the competency of the appellant to stand trial.

The manner in which the proceedings were conducted and the issues framed and presented by the trial judge and both counsel for the defense and the prosecution was admirable and commendable.

The jury found that the appellant was competent to stand trial at the time of her trial on March 18, 1975. While there appears to be no question that the appellant was (and is) suffering from amnesia concerning the events that occurred at

the time of the homicide, there was ample evidence that the appellant was able to comprehend her position as one accused of murder, was fully capable of understanding the gravity of the criminal proceedings against her, and was able to cooperate with her counsel in making a rational defense except to the extent that she could not remember anything about the homicide.

All the state's evidence against the appellant was circumstantial and of a physical nature; it did not rest on the testimony of any eyewitness or upon statements attributed to the appellant. Prior to trial there was an offer of disclosure of some evidence made by the state to defense counsel.

Under almost identical factual situations the accused has been held competent to stand trial and that trial would not violate his right to due process. *Arizona v. McClendon*, 103 Ariz. 105. 437 P. 2d 421 (1968); *Commonwealth ex rel. Cummins v. Price*, 421 Pa. 396, 218 A.2d 758, cert. denied, 385 U.S. 869, 87 S. Ct. 136, 17 L.Ed.2d 96 (1966).

In this state the rule was most recently expressed in the case of *Davis v. State*, 354 So.2d 334 at 339 (Ala. Cr. App. 1978).

> "Even if appellant did not in fact remember the details of the crime, he would still be competent to stand trial. *Amnesia* concerning the crime does not bar prosecution. A contrary rule would unduly hamper the State's interest in the prosecution of violators of its criminal laws and jeopardize the safety and security of other citizens. We here and now reject the notion that amnesia, standing alone

> and absent the three factors above mentioned,[1] constitutes incompetency to stand trial."

An annotation on the subject of amnesia as affecting capacity to commit crime or stand trial may be found at 46 A.L.R. 3d 533 (1972).

> "In determining a defendant's capacity to stand tril, the test is whether he has the capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed.
>
> "An important factor in determining the capacity of a defendant to stand tril is the defendant's mental ability to render to his counsel such assistance as to make possible a proper defense. While the defendant's ability to recall events so that he can furnish facts to his counsel is important, all of the cases in this annotation dealing with capacity to stand trial have recognized, either expressly or by necessary implication, that the amnesia of a defendant does not per se render him incapable of standing trial or of receiving a fair trial."
> 46 A.L.R. 3d at 553.

---

1. "Three factors are to be considered by the trial court in evaluating an accused's competency to stand trial, (1) the existence of a history of irrational behavior, (2) prior medical opinion, and (3) accused's demeanor at trial."
Davis, 354 So. 2d at 338.

The Pennsylvania Supreme Court has held that it would not be a violation of the defendant's constitutional rights to stand trial, even though he was suffering from amnesia and all the evidence against him was circumstantial.

> "This defendant (we repeat) is able to comprehend his position as one accused of murder, is fully capable of understanding the gravity of the criminal proceedings against him, and is as able to cooperate with his counsel in making a rational defense as is any defendant who alleges that at the time of the crime he was insane or very intoxicated or completely drugged, or a defendant whose mind allegedly went blank or who blacked out or who panicked and contends or testifies that he does not remember anything."
>
> * * *
>
> "If in fact the condition of amnesia *is permanent*, defendant's contention (1) would require Courts to hold that such amnesia will permanently, completely and absolutely *negate all* criminal responsibility and (2) will turn over the determination of crime and criminal liability to psychiatrists, whose opinions are usually based in large part upon defendant's self-serving statements, instead of to Courts and juries, and (3) will greatly jeopardize the safety and security of law-abiding citizens and render the protection of Society from crime and criminals far more difficult than ever before in modern history.

> "Unless an accused is legally insance, the law is not and should not be so unrealistic and foolish as to *permanently free, without acquittal* by a Judge or a jury, a person against whom a prima facie case of murder is made out."
> (Emphasis is original.)
> *Commonwealth ex rel. Cummins v. Price,* 431 Pa. 396, 218 A.2d 758 at 763, cert. denied, 385 U.S. 869, 87 S. Ct. 136, 176 LEd. 2d 96 (1966).

In finding that lack of memory is an inadequate ground for holding a defendant incompetent to stand trial, the United states Court of Appeals for the Seventh Circuit commented on the plight of the amnesiac.

> "In his plight the amnesiac differs very little from an accused who was home alone, asleep in bed, at the time of the crime or from a defendant whose only witnesses die or disappear before trial. Furthermore, courts, of necessity, must decide guilt or innocence on the basis of available facts even where those facts are known to be incomplete, and the amnesiac's loss of memory differs only in degree from that experienced by every defendant, witness, attorney, judge, and venireman. How much worse off is a generally amnesiac defendant on trial for murder, for example, than one who remembers all but the dispositive fact: who struck the first blow?"
>
> * * *
>
> "If a defendant is permanently amnesiac, further-

more, there will be no time in the future when the court can secure the benefit of his version of the facts. The choice facing the court would therefore be that of proceeding to adjudicate the defendant's guilt or innocence on the basis of incomplete data or abandoning the adjudicatory process altogether. Note, Amnesia: A Case Study in the Limits of Particular Justice, 71 Yale L.J. 109, 128-29 (1961)."
United States v. Stephens, 461 F.2d 317 at 320 (7th Circuit), cert. denied, 409 U.S. 948, 93 S. Ct. 292, 34 L.Ed.2d 218 (1972).

Therefore, we hold that the fact that the appellant suffered amnesia as to the commission of the crime does not render her incompetent to stand trial. The evidence supports the finding of the jury and the well settled law commands this result.

In view of the foregoing considerations and our previous opinion, the judgment of conviction and sentence appealed from should be affirmed.

AFFIRMED.

All Judges Concur.

APPENDIX B

DECISION OF THE COURT OF CRIMINAL APPEALS OF ALABAMA

IN THE COURT OF CRIMINAL APPEALS OF ALABAMA

Entered: August 29, 1978

PEGGY JEAN THOMPSON, Appellant

vs. 8TH DIV. 672

STATE OF ALABAMA, Appellee

ON REHEARING

BOWEN, J.

Because of the arguments presented by the appellant on application for rehearing, an extension of our opinion is warranted. The sole issue to be determined in considering the application for rehearing, as in our initial opinion, is whether the appellant's inability to recall the facts of the event for which she was charged rendered her incompetent to stand trial as a matter of law. We hold that it does not.

The United States Supreme Court in *Dusky v. United States,* 362 U.S. 402, 80 S.Ct. 788, 789, 4 L. Ed.2d 824, 825 (1960), stated that the test for determining a defendant's competency to stand trial was "whether he has sufficient present ability to consult with his lawyer with a

reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him". Courts continue to rely on this standard for determining competency. *Deason v. State*, ___Ark.___ 562 S.W.2d 79 (1978). This court, too, recognizes and relies on the *Dusky* standard. *Edgerson v. State*, 53 Ala. App. 581, 586, 302 So.2d 556, 560 (1974).

The New York Court of Appeals in interpreting the New York statute [1] concerning competency in the light of *Dusky* held that a defendant suffering from persisting amnesia would be found incompetent only in the situation where he had a "*current inability* to comprehend, or at least a severe impairment to that mental state", and could not "with a modicum of intelligence assist counsel". *People v. Francabandera*, 33 N.Y.2d 429, 435-36, 310 N.E.2d 292, 295,354 N.Y.S. 2d 609, 613-14 (1974) (emphasis added). The Court specifically rejected defendant's argument that no person can assist in his own defense, or, no lawyer can properly represent a client who is unable to furnish facts concerning the event charged against him. 354 N.Y.S.2d at 609.

In *Dusky*, just as in the case at bar, a competency hearing was ordered to determine defendant's present competency to stand trial, not to determine defendant's ability to recall facts concerning the events of the crime and relate them to his lawyer. Due process of law requires this separate hearing. *Pate v. Robinson*, 383 U.S. 375, 86 S. Ct. 836, 15 L.Ed.2d 815 (1966).

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1. " 'Incapacitated person' means a defendant who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense." N.Y. Crim. Proc. Law, § 730.10(1) (McKinney 1971).

Due process of law was afforded appellant at her competency hearing. Psychiatric testimony produced at this hearing was sufficient to indicate that the *Dusky* standard has been complied with.

Dr. Harry Kinnane, a psychiatrist, testified on direct examination: "I think she could comprehend her position to the extent that she was in a courtroom, that she was being tried for murder of her husband." And later on cross examination:

"Q. So she understood the nature of the proceedings against her?

"A. I would say so.

"Q. And she could have a rational and factional (sic) understanding of what was going on in that room?

"A. Yes, sir.

"Q. The only thing you are saying is that she couldn't remember that period of time that is blocked out?

"A. That's correct.

"Q. She is a perfectly competent person except that she aon't (sic) remember what happened for some weeks surrounding May 17th, 1974?

"A. Yes."

Another psychologist, Dr. Roger Rinn, testified on cross examination.

> "Q. All right, I will ask you presently if she is able to participate of the conduct of her defense in this matter in a rational manner such as she has been to see you?
>
> "A. Yes."
>
> * * * *
>
> "Q. And talk to her lawyer about what happened and conveyed to him the proceedings that went on in these tests if he asked her about it?
>
> "A. I guess so."

Appellant's ability to remember and relate facts concerning the experiences of her life after her release from the hospital was uncontradicted.

Other jurisdictions have relied on psychiatric examinations and evaluations to determine whether the defendant could understand the charge, whether he could understand what was going on at trial, whether he was capable of talking to his attorney about the proceedings and whether the defendant could discuss the charge with his attorney sufficiently to make his defense. *State v. Willard*, 292 N.C. 567, 234 S.E. 2d 587 (1977): *People v. Soto*, 68 Misc.2d 629, 327 N.Y.S.2d 669 (1972); *Jackson v. State*, 548 S.W.2d 685 (Tex. Crim. App. 1977). A defendant may be found incompetent to stand trial at one point in time due to his inability

to assist counsel in his own defense, and later be adjudged competent if he can understand the charges, the events of the crime can be constructed from information given him from other sources, and he can follow the course of the proceedings against him and discuss them with his attorney, even though an independent recollection of the events of the crime can never be had by the defendant himself due to permanent amnesia. *United States v. Wilson*, 363 F.Supp. 528, 530 (D.D.C. 1966).

A defendant's ability to understand the factual proceedings as discussed in *Dusky* refers to his capacity to understand the trial proceedings and his ability to consult with his attorney in a rational manner, not the defendant's capacity to understand or recall the factual events of the crime itself. Indeed, it is contradictory to suggest that a defendant could simultaneously understand the factual proceedings of the crime as it happened and have amnesia regarding those same events.

The North Carolina Court in *State v. Willard*, 292 N.C. 567, 234 S.E.2d 587 (1977), held that a defendant's amnesia concerning the events of the crime would not prevent him from comprehending his position and understanding the nature of the proceedings against him, it being realized that the defendant's available defenses would be limited if he was unable to recall the events of the crime. "We do not believe this fact alone renders him incompetent to stand trial or denies him a fair trial . . . ." 234 N.E.2d at 593. Again, the Massachusetts Court in *Commonwealth v. Hubbard*, ___ Mass.___, 355 N.E. 2d 469, 476 (1976), applying the *Dusky* standard found the defendant competent to stand trial, even though he had no memory of the crime in question, be-

cause he was able to consult with his lawyer about the pending charges, to understand what the trial involved and what its consequences might be, and to make intelligent decisions on the options available. In *State v. Gardner*, 534 S.W.2d 284, 289 (Mo. App. 1976), the Missouri Court stated that "if a defendant has, in fact, developed an amnesia preventing his recollection of the day or days in question, this would not constitute a defense if defendant has sufficient present ability to consult with defending counsel with a reasonable degree of rational understanding and is possessed of a factual understanding of the proceedings against him". Cases in accord from other jurisdictions are: *Fajeriak v. State*, 520 P.2d 795 (Alas. 1974); *Reagan v. State*, 253 Ind. 143, 251 N.E.2d 829 (1969); *State v. Pugh*, 117 N.J. Super. 26, 283 A.2d 537 (1971).

In no case yet reported has it been held that inability to recall the events constituting the crime charges because of amnesia constitutes mental incapacity to stand trial. *United States ex rel Parson v. Anderson*, 354 F.Supp. 1060, 1071 (D. Del. 1972); *People v. Francabandera*, 33 N.Y. 2d 429, 436, 310 N.E. 2d 292, 354 N.Y.S.2d 609, 614 (1974); *Jackson v. State*, 548 S.W.2d 685, 691 (Tex. Crim. App. 1977); 46 A.L.R.3d 544.

Recently, in *Commonwealth v. Barry*, 476 Pa. 602, 383 A.2d 526 (1978), a case similar to the one before us in that the appellant's amnesia was caused by a gunshot wound to the head and the absence of eyewitness testimony, the Supreme Court of Pennsylvania reaffirmed the position it took in *Commonwealth ex rel Cummins v. Price*, 421 Pa. 396, 218 A.2d 758 (1966), by holding that the appellant' amnesia did not deny him effective assistance of counsel nor the

opportunity to present a defense.

We commend counsel for his vigorous and thorough representation of the appellant and understand his concern for the defendant who cannot recall the events constituting the crime charged. However the present state of the law authorizes but one conclusion. For the above reasons this application of rehearing is due to be overruled.

OPINION EXTENDED;
APPLICATION FOR REHEARING OVERRULED

All Judges Concur.

APPENDIX C

DECISION OF THE SUPREME COURT OF ALABAMA

IN THE SUPREME COURT OF ALABAMA

Entered: November 22, 1978

PEGGY JEAN THOMPSON, Appellant

vs. 77-763

STATE OF ALABAMA, Appellee

Certiorari to the Court of Criminal Appeals, 364 So.2d 681.

ALMON, Justice,

WRIT DENIED.

TORBERT, C.J., and BLOODWORTH, FAULKNER and EMBRY, JJ., concur.